

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION
STATE CHARTER SCHOOL APPEAL BOARD**

Community Academy of Philadelphia Charter School,	:	
	:	
	:	
v.	:	
	:	Docket No. CAB 2013-12
School District of Philadelphia and School Reform Commission,	:	
	:	

**DECISION ON CHARTER SCHOOL’S MOTION TO REVERSE
HEARING OFFICER’S MAY 9, 2014 ORDER
AND PETITION TO CERTIFY FOR INTERLOCUTORY APPEAL**

I. Background

This matter comes before the Pennsylvania State Charter School Appeal Board (“CAB”) on appeal by the Community Academy of Philadelphia Charter School (“CAPCS”) from the Philadelphia School District School Reform Commission’s (“District” or “SRC”)¹ decision to revoke CAPCS’s charter. As the hearing officer was preparing the appeal for presentation to CAB, CAPCS requested that further action in the appeal be stayed until decisions in ancillary proceedings had been made. The hearing officer denied this request on May 9, 2014, and it is from this decision that CAPCS is now appealing or seeking certification to appeal. The parties filed briefs, and the Motion and Petition were argued before CAB on July 29, 2014.

CAPCS operates within the Philadelphia School District. Its initial charter was approved in 1997, and the charter was renewed in 2001 and 2006. CAPCS sought renewal of its charter again in 2011, but the SRC votes on that renewal are the subject of litigation that is pending in the Philadelphia Court of Common Pleas. Thus, consistent with law, CAPCS continues to

¹ The District had been declared distressed, pursuant to section 6-691 of the Public School Code, and thus a School Reform Commission was established which exercises the powers formerly residing the school board. 24 P.S. § 6-696(a).

operate under its 2006 charter. In the spring of 2013, however, the SRC commenced revocation proceedings and voted to revoke CAPCS charter on October 17, 2013. CAPCS filed its appeal from this revocation decision with CAB on November 15, 2013. A hearing officer was appointed, and then CAPCS asked that consideration of the appeal be deferred because of two ancillary legal proceedings that it viewed as being integral to CAB's ultimate decision. The hearing officer rejected this request, and CAPCS has filed the instant motion asking CAB to reverse that decision or to find that this is a novel and significant issue that must be decided by the courts.

II. Discussion

CAPCS position, in short, is that CAB cannot proceed to make a decision in this appeal absent a decision by the Philadelphia Court of Common Pleas in the pending declaratory judgment action because CAB cannot know which charter is at issue.² The Court of Common Pleas action concerns the validity of a 2011 vote by the SRC on a charter renewal request and involves the question of whether a majority vote of the full membership of the SRC is necessary to constitute action by the SRC. The five-member SRC, with one position vacant, voted 2-1 with one abstention to grant renewal; however the SRC took the position that this vote was insufficient to constitute action. CAPCS asserts that there are two charters potentially in play – the 2006 charter or the 2011 charter – and that CAB cannot render a decision until the Common Pleas Court decides whether there is a 2011 charter. Thus, in its Motion, CAPCS asserts that the

² The other ancillary proceeding raised by CAPCS was an appeal from a decision in a Right to Know Law matter that is also in the Philadelphia Court of Common Pleas relating to the revocation/nonrenewal proceeding. However, CAPCS is no longer arguing that the pendency of this action is a justification for its requested deferral. Thus, CAB will not consider this aspect of the argument.

hearing officer's May 9, 2014 decision was legally improper or, in the alternative, that this is a question of such great import that it should be addressed in the first instance by the courts.³

CAPCS also contends that it will be denied due process because it does not know whether its 2006 charter or its 2011 charter is being revoked and that the Common Pleas Court decision is necessary to determine which charter is in effect. CAPCS also argues that principles of *res judicata* bar the nonrenewal/revocation proceeding from moving forward because if CAPCS prevails in Common Pleas Court, it will be granted renewal and the District and CAB should be barred from re-litigating whether to renew the charter.

The District disagrees. First, it argues that CAPCS' Motion is untimely. Alternatively, it argues that the Motion is just another step in the delay strategy being employed by CAPCS to remain open. The District contends that deferral is neither warranted by the facts nor necessitated by the law. Regarding the *res judicata* argument, because it was not raised before the hearing officer the District argues that it was waived. Even if not waived, the District contends that the facts of this matter do not satisfy the test for applying this legal principle.

Regarding the issue of timeliness, the District correctly points out that the procedural rules applicable to this motion set a 10-day time limit for filing an appeal from a hearing officer's ruling.⁴ In this case, CAPCS initially appealed to the Commonwealth Court on June 3, 2014 but subsequently withdrew the petition and filed its motion with CAB on June 24, 2014. The District did not object when this filing date was set in a conference call with counsel; thus CAB will not now entertain this procedural objection to the filing.

³ CAPCS clarified in its reply brief that it was seeking certification only if CAB denied its request to reverse the hearing officer, not as an alternative to its appeal of that decision.

⁴ 1 Pa.Code §53.20.

Regarding the substance of the motion, CAPCS is currently operating under its 2006 charter, since its renewal request remains pending while the Court of Common Pleas decides the legality and import of the 2011 votes of the SRC. Under the law, the 2006 charter remains in effect until acted upon by the District, or, if an appeal is filed until a final decision by CAB. *See, Community Academy of Philadelphia Charter School v. The School District of Philadelphia*, CAB No. 2011-05, at p. 3; 24 P.S. §17-1729-A(f). Thus, because an appeal has been filed, and there has been no final decision by CAB, the 2006 charter remains in effect. CAPCS' contentions notwithstanding, it is the 2006 charter that was revoked by the District on October 17, 2013. There was no other CAPCS charter in existence at that time, and the District's reasons for revocation, if premised upon violations of the school's charter, must relate to that existing 2006 charter document. The reasons for revocation apparently include matters during the entire period of that charter, from 2006 to date. CAPCS expresses concern about what is now only a hypothetical situation -- what if the Court of Common Pleas upholds its position that the votes to grant renewal were legal and effective? What would occur is simply that the District and CAPCS would begin the process of preparing and executing a renewal charter. There is not now any 2011 charter, contrary to CAPCS' assertion. Any subsequent charter is inchoate at present and would not come into existence until after CAPCS obtained a final judicial determination in its favor. The 2006 charter, by operation of law, extends until a new charter is executed.

Moreover, as the hearing officer correctly concluded, a school district may initiate charter revocation proceedings at any time. The Charter School Law imposes no temporal limitations on the filing of a revocation notice. The SRC's position on whether CAPCS should have a charter and whether it was operating in compliance with law is the same regardless of whether the charter was executed in 2006 or is executed subsequently. CAPCS should not be permitted to

further delay a decision by CAB simply because the Court of Common Pleas may determine that the SRC vote was valid and that a renewal charter should be executed.

Next, concerning *res judicata*, this issue was raised for the first time in CAPCS' Motion to Reverse before CAB. Because this issue was not raised before the hearing officer, it has been waived. Commonwealth Court has held that a claim which is not raised before an agency hearing officer is not preserved for appeal and is waived. Victor v. Dept. of Labor and Industry, 647 A2d 289,293 (Pa. Cmwlth. 1994). Moreover, even had this claim not been waived, the elements required to establish the claim are lacking. *See, D.Z. v. Bethlehem Area School District*, 2 A3d 712,731 (Pa. Cmwlth. 2010). For example, for the doctrine of *res judicata* to be applicable to this case, the causes of action would have to be identical. That is, there would have to be an identity between the renewal proceeding of 2011 and the revocation proceeding of 2013. However, these are distinct, not identical, proceedings.⁵ A renewal is initiated by the charter school, whereas the district is the moving party to institute revocation. In addition, and certainly in this case, the information relied upon by the District in the revocation proceeding must logically be different information than that which resulted in 2-1 SRC votes to grant renewal, albeit votes that may not have constituted action by the SRC. Thus, CAB concludes that the doctrine of *res judicata* would not apply to this case and is not an impediment to moving forward with the appeal. Consequently, CAB will not reverse the hearing officer's ruling.

Finally, CAPCS has asked that if CAB fails to reverse the hearing officer's decision, then the matter should be certified for appeal to court. The District argues that this request is untimely and that the requirements for certification are not satisfied by the facts of this case.

⁵ And, as noted by the District, the declaratory judgment action in the Court of Common Pleas is an entirely different matter concerning an SRC vote.

Regarding the alleged untimeliness of this request, it seems contradictory to argue that CAPCS has failed to exhaust its remedies such that the request is premature and, at the same time, to argue that the request to certify is untimely because it was made 45 days after the hearing officer's decision. If anything, one might consider the request premature. However, to facilitate disposition of this matter, CAB will not place CAPCS in the position of having to refile this request to certify. Rather, it will be addressed now. Whether to certify is a discretionary determination premised upon concluding that: (1) a controlling question of law is involved; (2) there is substantial ground for difference of opinion regarding the question; and (3) immediate certification may move the case to ultimate resolution. 42 Pa.C.S.A. §702(b). CAB concurs with the District and holds that the grounds for certification have not been satisfied. A controlling question of law does not exist, since the law allows districts to initiate charter revocation proceedings at any time, and the action taken by the Court of Common Pleas, on the legal effect of the 2011 charter renewal vote, will have no impact on the revocation proceeding. If there is no controlling question of law, then there can be no difference of opinion on that question. Moreover, delay would have the opposite effect and would certainly not materially advance the ultimate determination of the matter.

III. Conclusion

Based upon the above discussion, CAB concludes that there are insufficient grounds to delay proceeding in this matter and makes the following:

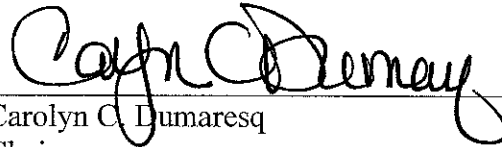
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Charter School :
 : Docket No. CAB 2013-12
Motion to Quash by Philadelphia :
School District School Reform :
Commission :

ORDER

AND NOW, this 27th day of September, 2014, based upon the foregoing and the vote of this Board,⁶ the Community Academy Charter School's Motion to Reverse is **DENIED**; and its Petition for Certification for Interlocutory Appeal is **DENIED**.

For the State Charter School Appeal Board,



Carolyn C. Dumaresq
Chair

DATE OF MAILING: Sept. 8, 2014

⁶ At the Board's July 29, 2014 meeting, the Motion to Reverse of the Community Academy of Philadelphia Charter School and the Petition for Certification for Interlocutory Appeal were both denied by a vote of 6 to 0, with Members Dumaresq, Henry, Miller, Munger, Peri, and Yanyanin voting to deny.